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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 987

PRADO OIL AND GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING CO.

No. 1026

SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, SUNRAY DX OIL COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Prado Pet. App. 18–34), is reported at 329 F. 2d 242. The opinions of the

Commission (R. 594–639, 708–721) are reported at 28 FPC 401 and 1065.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1964. The petitions for writs of certiorari were filed on April 10, 1964, and April 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission, in permanently certificating a producer's sales of natural gas at an initial price below the contract price, may condition such certificate upon a refund of excess charges previously collected under a temporary emergency certificate not so conditioned.

2. Whether the Federal Power Commission is required to consider cost and financial requirements evidence in determining the initial price at which it will certificate a producer sale.[1]

STATUTE AND REGULATIONS

The pertinent provisions of the Natural Gas Act and Section 157.28 of the Commission's regulations appear in Prado's petition, Appendix A, pp. 15–17.

STATEMENT

In 1959 and 1960 petitioners entered into contracts with South Texas Natural Gas Gathering Company for the sale of natural gas at 16 cents per Mcf. These sales were part of an integrated project in-

[1] This question is presented only in No. 987.

volving numerous purchases by South Texas for resale to Transcontinental Gas Pipeline Corporation in Texas Railroad District No. 4, located in the southern tip of Texas. The Commission proceedings were initiated between May 1959 and January 1960 by the filing of applications for certificates of public convenience and necessity [2] and the related applications of the purchasing pipelines, South Texas and Transco. The producers proposed to sell to South Texas at prices ranging from 9 to 17 cents per Mcf, and South Texas proposed to resell to Transco, to augment the latter's overall system gas supply. The Commission noticed these applications in the Federal Register [3] (24 Fed. Reg. 9519, November 25, 1959), consolidated them, and set them for hearing. Even before the notice, emergency authorizations had been obtained *ex parte* by many of the producers, including petitioners Coates and Continental, to commence service pending Commission decision on their applications.[4] These "temporaries" contained no express refund conditions but did contain provisions expressly reserving all questions of price, as the court below noted.[5]

[2] These included applications of petitioners Skelly, Coates and Continental.

[3] A number of additional producer applications, including Continental's, were not noticed or consolidated until February 19, 1960. 25 Fed. Reg. 1735 (February 27, 1960).

[4] The issuance of temporary authorizations for such emergency purposes is authorized by Section 7(c) of the Act, 15 U.S.C. 717f(c) and by § 157.28 of the Commission's Regulations under the Natural Gas Act (Prado Pet. 16–17). See *Federal Power Commission* v. *H. L. Hunt*, No. 273, this Term, decided March 30, 1964 (Slip Op. p. 6).

[5] Prado Pet. App. 31–32. The provisions read as follows (see, *e.g.*, R. 383–384): "This acceptance for filing shall not be con-

Temporary certificates were similarly issued to the later applicants before their applications were noticed and consolidated.[6]

The New York Public Service Commission and various eastern distributing companies intervened (R. 408–425), the latter alleging in their petitions that some of the proposed prices would cause a rise in the existing price level.[7]

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strued as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

* * * * * *

"This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act."

[6] Of the present petitioners only petitioner Skelly did not commence service until after it had accepted a permanent certificate (issued on November 22, 1960, see *infra*, p. 5), and it commenced service on February 23, 1961 (Tr. 4929) although on January 19, 1961, the Commission had granted New York's rehearing application challenging the certificate price (R. 527). (The citation "Tr." is to an unprinted portion of the Commission record, as certified to the court below.)

[7] Although these petitions indicated a knowledge that producers had or would commence service under temporary authorizations, no request for the inclusion of express refund conditions was made.

After hearing, the Commission on November 22, 1960, found that the producers' proposed prices were "in-line" and granted the permanent certificates (R. 495–505, 24 F.P.C. 979). The New York Commission sought rehearing, contending that the proper "in-line" price for the particular area was 14.6 cents per Mcf (Prado Pet. App. 20; R. 513–526). By then the Commission's practice of certificating producer sales at initial prices which it found "in-line" with the highest levels to which prices had risen at the time of the *Catco* decision (*Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378) had been strongly disapproved by two courts of appeals [8] and was under consideration in two others.[9] On January 19, 1961, the Commission granted the rehearing (R. 527).[10]

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[8] *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881; *P.S.C. of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *P.S.C. of New York*, 365 U.S. 880, and *Shell Oil Co.* v. *P.S.C. of New York*, 365 U.S. 882.

[9] *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A. 5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

[10] Later the proceeding was consolidated with thirty-five additional producer applications relating to the same project. 26 Fed. Reg. 2323 (March 17, 1961). Temporary authorizations were granted those applicants, also, before their applications were noticed and without any explicit refund conditions but with express reservation of all questions of price. Four days

After that hearing and examiner's decision, the Commission (by then comprised of an entirely new membership) issued the August 30, 1962, order which was reviewed below. It found that 15 cents per Mcf was the in-line price for sales under contracts executed prior to September 28, 1960,[11] and that the prices called for by several of the contracts, including those of petitioners, were out of line. As to all such sales, it imposed a condition prohibiting the charging of an initial price in excess of 15 cents unless and until that price should duly be changed under the rate provisions of the Act (R. 600–614, 631–632).[12]

The Commission based its determination of "in-lineness" on comparisons with prevailing prices in transactions which might properly be considered under the principles laid down in *Catco* (*supra*, p. 5) and succeeding decisions of the courts of appeals (*infra*, p. 13, n. 17; R. 604–609; see also R. 709–710, 714–715). With respect to the additional economic and financial evidence introduced by Texaco and Continental to justify their proposed prices of

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before the hearing was to commence, the Commission, without objection from any party, granted all of the producer applications at proposed initial prices of 14.5 cents or less (R. 534–538).

[11] Later, in *Amerada Petroleum Corp., et al.*, Docket No. C162–1544, *et al.*, Opinion No. 422, issued March 23, 1964, the Commission found 16 cents to be the in-line price for sales contracted after issuance of the Statement of General Policy on September 28, 1960 (24 F.P.C. 818).

[12] This condition did not prevent the affected producers from filing increased rates up to the contract price immediately after the conditioned rate became effective. Indeed, Prado made an increased filing to 16.7 cents with respect to one of the rate schedules here involved and put that rate into effect, after a five months' suspension, in September 1963.

16.4965 cents and 16 cents, respectively, the Commission held (R. 610–611):

> * * * [W]e do not think it necessary or appropriate in a certificate proceeding to consider evidence of area costs or financial requirements, or of individual company costs or financial requirements. Any such approach is of limited utility and leads to complicated, long-drawn-out proceedings, detrimental to the public [footnote omitted].
>
> * * * * * *
>
> Obviously, we cannot permit every individual certificate case to be converted into a full-blown rate case; the proof in this proceeding demonstrates the lack of utility of a limited cost of service presentation.[13]

[13] The Commission illustrated this by specific reference to Texaco's estimates of cost of future replacement of present reserves rather than their actual costs (R. 610–611) and Texaco's assumption that such costs should be borne by present customers rather than venture capital. It also pointed out that Continental's evidence that it would have to receive $2.78 per Mcf in order to recoup its cash outlay, was so narrowly limited that it would not form a proper basis for appraising financial requirements (R. 612). But the Commission was careful to emphasize it was not excluding the possibility that a price above an in-line price might be permitted (R. 611):

"* * * We do not mean to foreclose the possibility that a producer may present compelling circumstances in a particular proceeding to justify a higher price, but we wish to emphasize that with the guidelines herein established the price issue in certificate cases should be handled expeditiously and that before any evidence which would customarily be presented in establishing a just and reasonable rate can be admitted in evidence, a convincing showing must be made that such evidence is essential to the just disposition of the price question."

With respect to the intervenors' contention that refunds should be ordered of all amounts already collected under the temporaries in excess of the proper initial price, the Commission, in its opinion on rehearing, held "that it would be inequitable to require the producers to make refunds where they were issued temporary certificates in general language without specific provision for refunds" (R. 716).

A unanimous court of appeals affirmed the Commission's "in-line" determination, holding, *inter alia,* that the Commission was not required to consider the evidence of costs and financial requirements introduced by some of the producers. The court further concluded that the Commission had the power to order refunds for the period of service under a temporary certificate even though that certificate contained no express refund condition, explaining in part (Prado Pet. App. 31):

> * * * The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or

> mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates.

While thus rejecting the producers' contention that the Commission was without power to order refunds, the court also rejected the claim of the New York Commission and a group of distributing companies that the ordering of refunds was mandatory. And while it agreed with the Commission, that equitable considerations governed the issuance of a refund order, it held that the absence of refund conditions was not in itself a controlling factor. Accordingly, it remanded the case to the Commission for "further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates" (Prado Pet. App. 34).

ARGUMENT

1. Prado's principal, and Skelly's sole, contention is that the Commission has no power to require refunds of excessive charges collected under temporary certificates issued without express refund conditions. We do not deny the importance of that question.[14] There

[14] The decision below appears to be inconsistent with the reasoning of the Tenth Circuit in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404, 407–410. There, the court held that the Commission could not properly require the producer, as a condition for receiving a temporary

is no occasion, however, for this Court to consider the issue at the present stage of the proceedings. The Commission has not yet required refunds to be made,

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certificate, to agree in advance to refund charges in excess of those ultimately found proper, since such a condition denied the producer's "right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part." We note, however that the court in *Sunray* made no attempt to reconcile that producer's desire for certainty with the countervailing interests of consumers and distributors, who had no notice or opportunity to be heard at the time the temporary certificate was issued. In *Sunray*, unlike the present case, there was no intervention by representatives of the consumer interests, and the Commission did not submit to the Court the considerations, urged by the interveners here, which the court below deemed persuasive. It is quite possible, therefore, that the Tenth Circuit would reach a different result if the issue were again placed before it.

Contrary to Skelly's contention, the decision below is not in conflict with the decisions of this Court holding that the Commission has no power to order "reparations." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618; see also *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3), certiorari denied, 353 U.S. 923. The Commission's authority to order refunds of excessive charges collected pursuant to a temporary certificate is no more dependent upon the power to award "reparations" than refunds of excesses of rates collected under a judicial stay *pendente lite*. See *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, and particularly the concurring opinion of Mr. Justice Frankfurter. It stems, not from any "reparations" power, but from the inherently conditional character of the temporary certificate itself. Such certificates are issued at the producer's behest in cases of emergency, without a showing of public convenience and necessity and without notice to or opportunity to be heard by other interested parties. See *Federal Power Commission* v. *H. L. Hunt*, No. 273, this Term (decided March 30, 1964). It would be quite unfair to those parties if the producer were permitted to retain the excessive amounts

having declined to do so on equitable grounds. The court below concluded that the Commission had failed to take account of all relevant equitable factors and, instead, had improperly treated the absence of refund conditions as decisive; accordingly, the court remanded the case for fuller consideration. We do not challenge that ruling. It is entirely possible, however, that the Commission, after reviewing all pertinent factors, will again reach the conclusion that refunds are inappropriate. In that event, the issue tendered by the petitioners would disappear. On the other hand, should refunds be ordered, petitioners would still be in a position to challenge the Commission's power [15] and also to raise any new issues concerning the manner in which that power was exercised.

Adherence to this Court's policy of declining to review interlocutory decisions [16] seems particularly

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collected pursuant to such emergency authorization, except in cases where a full consideration of the competing equities so warranted. In the instant case, moreover, the tentative and conditional nature of the price designated in the temporary certificate was made explicit by the provision that acceptance "shall [not] be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company." *Supra*, p. 4, n. 5.

[15] *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257–258; see also *Urie* v. *Thompson*, 337 U.S. 163, 172–173; *United States* v. *U.S. Smelting Co.*, 339 U.S. 186, 198–199; Stern and Gressman, *Supreme Court Practice* (3d ed. 1962), Section 2-2.

[16] See Stern and Gressman, *Supreme Court Practice*, (3d ed. 1962), Section 4-19.

appropriate here. In both petitions, the argument is made (Prado Pet. 8–9; Skelly Pet. 25) that producers typically incur substantial and non-recoverable costs—*e.g.*, royalties, federal income taxes, state production taxes—on the basis of the prices specified in their temporary certificates and hence would be severely injured if refunds were later ordered. But this is precisely the kind of equitable consideration which the Commission must evaluate in the remand proceeding in light of the concrete evidence adduced by the parties. The courts will be able to appraise the force of petitioners' argument more realistically when they have the benefit of the relevant facts.

2. Contrary to Prado's contention (Prado Pet. 10–12), the Commission's refusal to consider the producers' costs or financial requirements in passing upon their applications for permanent certificates was both proper and consistent with *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (*Catco*). In *Catco*, this Court made it clear (360 U.S. at 390–391) that the Act does not require a determination of just and reasonable rates in a certificate proceeding under Section 7 as it does in a rate case under either Section 4 or Section 5 and that where "the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." The rule was reiterated recently in *Federal Power Com-*

mission v. *H. L. Hunt*, No. 273, this Term (decided March 30, 1964).

In accordance with *Catco* and subsequent decisions,[17] the Commission has followed the practice of certificating initial sales in interstate commerce at prices no higher than those at which substantial volumes of gas were purchased under properly certificated contracts executed in the same area during the same general period. For the period and area involved here that price was 15 cents—a finding affirmed below and not now challenged. In terms of the statutory standard of "public convenience and necessity," the appropriateness of the "in-line price" criterion and the irrelevance of the economic data relied upon by Prado are readily apparent, for the public convenience and necessity would rarely require that gas be allowed to enter the interstate market at prices higher than those which other persons negotiating at the same time in the same area are willing to accept for

[17] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195, reversing *United Gas Improvement Company* v. *Federal Power Commission*, 269 F. 2d 865 (C.A. 3); *Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (C.A. D.C.); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A. D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880, and *Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 882; and *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881.

the same product. Certainly this is true where, as here, substantial amounts of gas were contracted for at prices lower than those of Prado.

Prado's reliance on *Catco* is predicated on a misreading of the opinion (360 U.S. at 392–393). *Catco* involved the first sales from newly developed fields off the shore of South Louisiana (360 U.S. at 385); an area in which no price line had yet been established. Since the purchaser, Tennessee Gas Transmission Company, was buying gas from fields in a nearby off-shore area at prices substantially lower than those of its *Catco* contracts, the Court understandably questioned the producers' failure to show any factual distinction *between the two areas.*[18] It scarcely follows, however, that the Commission must look to cost or similar economic evidence in the normal certificate case arising in an already developed area where the "in-line" price is readily determinable. Petitioner's contrary contention would have the effect of converting every individual certificate case into a full-blown rate case, a result which *Catco* did not contemplate. *Atlantic Refining Co.* v. *Federal Power Commission, supra,* 360 U.S. at 390. See, also, *California Oil Co., Western Division* v. *Federal Power Commission,* 315 F. 2d 652, 659–660 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Com-*

[18] In a comparable situation where gas was sold from a new production area, the Commission has since made just such a comparison and imposed a price-reducing condition largely on the basis of the price level in an existing area adjusted by certain differences between the two areas. See *El Paso Natural Gas Co.*, 23 FPC 369, 376–377, affirmed *sub nom. Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (C.A. 5).

mission, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881. Indeed, "[t]his would tend to defeat the objective of providing simple, direct and effective stopgap protection for the consuming public." *United Gas Improvement Co.* v. *Federal Power Commission, supra*, 283 F. 2d at 823.

CONCLUSION

For these reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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